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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 813

THE OHIO POWER COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Claims

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

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Petitioner files this reply to dispose of respondent's erroneous contention that petitioner's alternative issue is based solely on facts which were in the record when this case was here before. At pages 9-10 of its brief in opposition, respondent argues that petitioner's alternative issue is entirely a question of law not dependent upon new facts. That proposition is incorrect.

Respondent now seems to admit that construction of the Tidd plant was commenced in August of 1943, although in the court below the respondent denied that

fact.* The date when construction commenced, however, is only one of the essential facts which petitioner must prove to establish the allegations under the alternative issue.

In its proposed amended petition in the court below, petitioner alleged that the rules, regulations, interpretations, and administrative practices of the Secretaries of War and Navy in effect prior to October 5, 1943, prohibited the issuance of the kind of percentage necessity certificate involved in this case, namely, an "excess war cost" certificate. In order to prove that allegation, petitioner will establish by competent evidence in the court below that the rules and regulations of the Secretaries of War and Navy did not permit the issuance of an "excess war cost" certificate in this case, and that such regulations had been consistently so interpreted and administered not only by the Secretaries of War and Navy but also by the War Production Board with respect to construction commenced prior to October 5, 1943. No such evidence is as yet in the record in this case, and obviously it could not have been considered by this Court when the case was here before. Furthermore, petitioner will prove that the War Production Board's "excess war cost" rule was designed to be applied *prospectively* only, and that the rule was mistakenly applied *retroactively* to petitioner's Tidd plant. Until petitioner is permitted to present all such evidence it will not have had its day in court with respect to the alternative issue raised by the motion below.

In the *Allen-Bradley* and *National Lead* cases, respondent had the benefit of a detailed statement of

* Defendant's Brief in Opposition to Motion for Leave to File Amended Petition and for a New Trial, p. 23

an officer of the War Production Board explaining the interpretations and practices of that Board under its regulations, issued *after* October 5, 1943, to support its "excess war cost" rule. That statement was used by the Government to prove that the War Production Board interpreted the amendment of October 5, 1943, as authorizing for the first time the issuance of "excess war cost" certificates where construction had been commenced *after* that date. Petitioner is likewise entitled to present to the court below that same type of evidence with respect to the interpretation and administration of the regulations in effect *prior to* the amendment of October 5, 1943, and applicable to construction commenced *prior to* such date. Executive Order 9406 (8 Fed. Reg. 16955, 12/17/43) recognizes that the practices and procedures controlling the issuance of necessity certificates under the regulations of the Secretaries of War and Navy were different from those of the War Production Board when it provided that the former should be applied in issuing certificates for facilities commenced before October 5, 1943. Without evidence as to all these facts neither this Court nor the court below can determine the type of certificate legally issuable under the regulations of the Secretaries of War and Navy prior to their amendment. *A fortiori*, this Court could not have passed upon the alternative issue when the case was previously here.

Respondent devotes most of its brief in opposition to the contention that this Court previously considered and rejected *sub silentio* the alternative issue. Petitioner has set forth in its application for certiorari the reasons why this Court could not properly have passed upon the alternative issue and respondent has

failed to offer any authority which would have justified this Court in deciding such issue. The most important of petitioner's reasons is that the facts upon which the alternative issue depends were not in the record and had not been resolved by the trial court. The absence from the record of the facts necessary to decide the alternative issue is, we submit, dispositive of this whole matter.

Certiorari should therefore be granted and the case remanded to the court below with the advice that this Court has not passed upon petitioner's alternative issue. *Cf. Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. , 2 L. ed. 374 (January 27, 1958). Such an order will permit the lower court to exercise its discretion in considering petitioner's motion based on the alterrative issue.

Respectfully submitted,

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